No. 12,514

IN THE

United States Court of Appeals

For the Ninth Circuit

ORESTUS CAVNESS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING and MOTION TO STAY MANDATE.

FONG, MIHO AND CHOY,
Suite 202 Alakea Building,
Alakea and King Streets, Honolulu 13, T.H.,
HERBERT CHAMBERLIN,
Russ Building, San Francisco,
Attorneys for Appellant and Petitioner.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable United States Court of Appeals for the Ninth Circuit:

The appellant, Orestus Cavness, respectfully petitions for a rehearing in the above entitled cause. The grounds urged are these:

1. The court erred in upholding the ruling of the lower court denying appellant's motion to suppress evidence.

2. The court erred in upholding the ruling of the lower court denying appellant's motion for a mistrial because of misconduct of a government witness.

3. The court erred in upholding the ruling of the lower court denying appellant's motion for a new trial because of irregularities in the proceedings of the jury.

1. **THE COURT ERRED IN UPHOLDING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.**

In presenting this ground a review of some of the facts is necessary.

On July 12, 1949, narcotic agent Wells obtained a search warrant authorizing him to search "a one story wooden-frame building located at 3811 Leahi Avenue, Honolulu, T. H." (T. 5-7.) The search warrant was issued upon the affidavit of one Gerry Wilson who alleged she had purchased cocaine from appellant at said premises on July 10, 1949. (T. 3-5.) Admittedly, this affidavit did not state the truth, for in preparing the affidavit for the affiant's signature, narcotic agent Wells erroneously placed therein the date "July 10, 1949" as a date of purchase, whereas in truth and fact the affiant had informed narcotic agent Wells that the date was July 7, 1949. (T. 179-185.) Whether the United States Commissioner would have issued the search warrant on July 12, 1949, if the affidavit had alleged a purchase on July 7, 1949, instead of July 10, 1949, is, of course, problematical.

Certain it is, however, that the search warrant did not authorize narcotic agent Wells to search the person of appellant or anybody else. But in the return to the search warrant the court will notice that narcotic agent Wells recites, "I received the attached search warrant July 12, 1949, and have executed it as follows: On July 19, 1949, at 5:40 o'clock p.m., I searched (the person) (the premises) described in the warrant". (T. 7.) Later on, appellant will show that

the evidence he sought to suppress was property unlawfully taken from his person.

A valid search of the house at 3811 Leahi Avenue pursuant to the search warrant of July 12, 1949, did not depend upon the presence of appellant at the premises. (*Trupiano v. United States,* 334 U.S. 699, 707-708, 68 S. Ct. 1229, 1233.) Nor did it depend upon reading or exhibiting the search warrant to him or serving a copy upon him. (*Nordelli v. United States,* 9 Cir. 24 F. 2d 665, 667.) Regardless of his presence at 3811 Leahi Avenue or his absence therefrom the search warrant could have been readily and lawfully executed at any time after its issuance on July 12, 1949.

But narcotic agent Wells made no effort to execute the search warrant until July 19, 1949. At 2:40 p.m. of that day, and accompanied by several police officers, he went to premises across the street from 3811 Leahi Avenue and kept the latter premises and activities thereon under surveillance until after 5:38 p.m. (T. 51-52.) He saw appellant in and about the premises around 3:55 p.m., and watched him drive away in an automobile. (T. 51.) When appellant returned in the automobile at 5:38 p.m., narcotic agent Wells and the police officers descended upon him. While appellant was still in the automobile he was told by narcotic agent Wells that the latter had a search warrant "to search the premises". (T. 52.) And when appellant in attempting to get out of the automobile shoved narcotic agent Wells aside, a scuffle ensued and the police officers proceeded to "subdue" appellant. (T.

52-53, 118, 122.) In the subduing process, the property appellant sought to suppress as evidence was blackjacked from his person. (T. 111.) He received injuries consisting of a scalp wound, a black eye, a bruised cheek, and a cut lip, requiring emergency hospital treatment which he received on the way to the police station at 8:03 p.m. (T. 502-507.) Appellant was not placed under arrest before the scuffle, during its progress, or at its conclusion. (T. 122.) He was handcuffed and taken inside the house wounded and bleeding. (T. 112-114, 129.) There a copy of the search warrant was served upon him, and some time later he was placed under arrest. (T. 121, 129.) His conviction rests upon the property blackjacked from his person.

It is very obvious, therefore, that the record before the court does not reflect a case of the lawful search of person or property incident to arrest. What the record so plainly reflects is a case where an unlawful search of the person has been followed by an arrest based upon the evidence uncovered by the unlawful search. Evidence thus obtained is clearly within the condemnation of the principles announced and applied by the Supreme Court in *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222; *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367; *Trupiano v. United States,* 334 U.S. 699, 68 S.Ct. 1229, and *McDonald v. United States,* 335 U.S. 451, 69 S.Ct. 191. Appellant therefore respectfully urges that under the authority of those cases a rehearing should be granted, and the ruling of the lower court denying appellant's motion to suppress evidence should be disapproved.

2. THE COURT ERRED IN UPHOLDING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION FOR A MISTRIAL BECAUSE OF MISCONDUCT OF A GOVERNMENT WITNESS.

It is a rule well recognized in federal practice that the volunteer statements of a witness may be so harmful to the case of a defendant in a jury tried action that admonitions to the jury are patently inefficacious and the granting of a mistrial is mandatory. (*Beck v. Wings Field, Inc.*, 3 Cir. 122 F. 2d 114, 117.) That rule is applicable here.

The evidence was undisputed that appellant, who is colored, was blackjacked, wounded, and subdued by police officers at the time the search warrant was executed. Whether the officers acted brutally and without justification was a vital and perhaps decisive issue in the case. A government witness, a police officer who participated in the subduing, volunteered the statement that appellant was "hopped up" at the time. (T. 402.) There can be no room for doubting that the volunteer statement was harmful to appellant. Nor can there be room for doubting that the witness thereby conveyed or suggested to the jury that appellant was under the influence of narcotics at the time and the police officers had to subdue him by force. Poison of that character once spread cannot be eradicated by admonitions. Its tainting effect must inevitably persist no matter what a trial judge may say to the jury about it. Only a mistrial can relieve a defendant from its menace and prejudice. Appellant therefore respectfully urges upon the court that a rehearing should be granted and further consideration had of the ground here presented.

3. **THE COURT ERRED IN UPHOLDING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE OF IRREGULARITIES IN THE PROCEEDINGS OF THE JURY.**

The court room was converted into the jury room for the deliberations of the jury on the submission of the cause. Without authority from the trial judge, the United States Marshal having custody of the jury assumed authority and permitted one of the jurors to leave the jury room, separate from the other jurors, and go to the marshal's office to make a telephone call. The juror took advantage of the opportunity to make a further telephone call in the marshal's office. At the hearing of the motion for new trial the marshal, two of his deputies, and the juror testified respecting the irregularity, and their various versions lacked harmony in many respects. (T. 451-610.)

On the surface, the conversations as reconstructed by the jurors were innocuous enough, but from the very nature of the conversations it is unreasonable to suppose that no reference to or comment upon the case in which the juror was sitting and about to deliberate was made during the conversations. Surely, where irregularities in the proceedings of a jury are involved, mere surface indications cannot furnish a safe or proper guide. The fact remains that officials charged with the custody of the jury and the duty of preventing improper influences from exerting themselves upon the jury, relaxed that custody and created an opportunity for improper influences to exert themselves. The situation here is not one where the performance of official duty may be presumed, for the

officials tell us that they did not perform their duty. And the fact remains that those participating in the irregularity differ in their versions as to what actually occurred and it is plain that what actually occurred has not and cannot be ascertained.

The sound rule applicable to the situation here is that the irregularity must be deemed prejudicial and require the granting of a new trial if there is a *reasonable possibility* that injustice has been done. (*Snyder v. Massachusetts,* 291 U.S. 97, 113, 54 S.Ct. 330, 335; *Little v. United States,* 10 Cir. 73 F. 2d 861, 865-866.) That reasonable possibility existed and persisted in this case. The lower court relaxed the rule of reasonable possibility in denying the motion for new trial. The sound administration of criminal justice should prompt a rehearing and the restoration of the rule.

Wherefore it is respectfully submitted that a rehearing should be granted.

Dated, San Francisco,
April 2, 1951.

FONG, MIHO AND CHOY,
HERBERT CHAMBERLIN,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for appellant and petitioner in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco,
April 2, 1951.

HERBERT CHAMBERLIN,
Counsel for Appellant and Petitioner.

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For the Ninth Circuit

ORESTUS CAVNESS,
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vs.

UNITED STATES OF AMERICA,
Appellee.

MOTION TO STAY MANDATE.

To the Honorable United States Court of Appeals for the Ninth Circuit:

The appellant, Orestus Cavness, in the above entitled cause, hereby respectfully moves this Court, in the event that his Petition for Rehearing filed herewith be denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow appellant to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of Certiorari may

be granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
April 2, 1951.

FONG, MIHO AND CHOY,
HERBERT CHAMBERLIN,
Attorneys for Appellant.